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Nos. 90-1262 and 90-1266

In The

Supreme Court of the United States

October Term, 1991

STATE OF ARKANSAS, *et al.*,

Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF ILLINOIS, TENNESSEE, ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, MAINE, MICHIGAN, MISSISSIPPI, NEW JERSEY AND SOUTH CAROLINA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE STATES OF ILLINOIS, TENNESSEE, ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, MAINE AND NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The States of Illinois, Tennessee, Alabama, Arizona, California, Connecticut, Florida, Maine and New Jersey respectfully submit this brief as *amici curiae* in support of respondent and urge this Court to affirm the decision by the United States Court of Appeals for the Tenth Circuit, in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990) on the

primary issue in this case, the applicability of a downstream State's standards.[1]

INTEREST OF THE AMICI CURIAE

In the vernacular of this litigation, the *Amici* States are both "upstream States" and "downstream States", having navigable waters that originate within their boundaries, waters that enter and pass through their boundaries, and waters that serve as boundaries. The *Amici* States include States which, pursuant to the statute at issue in this litigation, commonly known as the Clean Water Act, 33 U.S.C. 1251-1387, have been delegated authority to issue National Pollutant Discharge Elimination System ("NPDES") permits and thereby regulate and control discharges into their waters. The *Amici* States also include States which have not been delegated NPDES authority. The *Amici* States have also promulgated water quality standards approved by the United States Environmental Protection Agency ("U.S. EPA") for the waters within their boundaries. Under both State and NPDES programs, the *Amici* States regulate municipal dischargers (such as those represented by signatories to the *amici curiae* brief of the Association of Metropolitan Sewage Agencies, *et al.*) and industrial dischargers (similar to the signatories to the *amici curiae* brief of Champion International Corporation, *et al.*).

[1] This brief is submitted on behalf of the *Amici* States by their respective Attorneys General. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

Further, the State of Tennessee is party to an ongoing NPDES permit proceeding before U.S. EPA concerning *amicus* Champion International Corporation's Canton, North Carolina, papermill, located on the Pigeon River, an interstate stream which flows into Tennessee. In that proceeding, U.S. EPA has issued an NPDES permit which it determined to be protective of Tennessee's water quality standards. That permit is being challenged by Champion International Corporation in proceedings pending before the U.S. EPA Administrator. Champion International Corporation has also challenged the applicability of Tennessee's water quality standards in a petition for review filed in the U.S. Court of Appeals for the Fourth Circuit. *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. pet. filed Jan. 3, 1991).

The *Amici* States are vitally interested in this case because a reversal of the Tenth Circuit's decision would totally undermine efforts by any State possessed of interstate waters to establish water quality within its boundaries at levels above the federal minimum standards established pursuant to the Clean Water Act. The stated goals of the Clean Water Act include establishing a Federal-State partnership in combating water pollution and recognizing, preserving and protecting the primary responsibilities and rights of the States to control and eliminate water pollution and "to plan the development and use * * * of land and water resources." (Section 101). One of the means for implementing these goals is section 303's provision for encouraging States to improve their water quality through the passage of their own water quality standards.

Under the interpretation of the Clean Water Act advocated by the Arkansas petitioners and supporting *amici* (and rejected by both the U.S. EPA and the Tenth Circuit), this goal of encouraging individual States to take the lead in determining what uses would be made of the waters within their boundaries and in improving water quality as needed to allow such uses would go unfulfilled. If an upstream State could authorize a discharge which would exceed a downstream State's stricter water quality standards in the latter State's waters then the downstream State would have to choose between eliminating, or severely restricting, any discharges within its boundaries in order to maintain its selected uses and enhanced water quality or abandoning those higher uses and its stricter water quality standards. Such a choice would inevitably lead to a progressive lowering of State water quality standards to levels at or near the federally-mandated minimum standards rather than advancing the Clean Water Act's goal of progressively cleaner water as a result of State initiatives. Such a system would result in a *de facto* abdication to the U.S. EPA of each State's leading role under the Clean Water Act in determining the uses of its waters and enhancing its own water quality. States would upgrade their water quality only when the U.S. EPA deemed it appropriate and made every State do so in order to avoid inflicting a disproportionate burden upon dischargers within their boundaries. Instead of being equal partners in the effort against water pollution, downstream States would quickly become "silenced" partners, no longer willing to invest any further effort or resources in enhancing water quality.

The Tenth Circuit's affirmance of U.S. EPA's determination that the NPDES permit for a discharge in an upstream State must be conditioned so as to attain compliance with a downstream State's stricter water quality standard, where that stricter water quality standard has been reviewed by U.S. EPA and approved as an "applicable water quality standard" pursuant to Section 303(c) of the Clean Water Act, more than adequately balances the interests of the upstream and the downstream State. It alone fulfills the goals of the Clean Water Act and makes upstream and downstream States equal partners.

If upstream dischargers are not enlisted in the effort to assure compliance with a downstream State's enhanced water quality standards through an across-the-board application of a U.S. EPA-approved water quality standard, then downstream dischargers will have to become involved in upstream permit proceedings in order to protect their current discharge levels. This would only make the permit proceeding more cumbersome. Leaving the accommodation of a downstream State's water quality interests to the unfettered discretion of the permitting authority, as the Arkansas petitioners advocate, is fraught with the potential for inciting economic warfare between States. In one permit great weight may be given to the downstream State's desired water uses (and correlating higher water quality standards) while in another permit the discharger's desire to provide as little treatment as possible may run roughshod over the downstream State's choice of water uses. Requiring a discharger whose effluent would affect water quality downstream to comply with the downstream State's federally-approved standards assures a more uniform

accommodation of both upstream and downstream interests than the crazy quilt resulting from different permitting agencies exercising unbridled discretion on a case-by-case basis. The haphazard nature of such an unwieldy system is further aggravated by the fact that this *ad hoc* balancing would have to be repeated every five years as permits are renewed.

The *Amici* States supporting the Oklahoma respondents do so because of their interest in having a system that promotes uniformity in balancing upstream and downstream interests and which encourages rather than punishes those States which seek to enhance water quality within their own boundaries. For all these reasons, the *Amici* States have a compelling interest in this case and respectfully urge this Court to affirm the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The interpretation of the Clean Water Act reflected in the Tenth Circuit's decision represents a proper balancing of the goals and purposes of the Clean Water Act, principles of State sovereignty, the requirements of the Commerce Clause, and principles of statutory interpretation. A reversal of that decision would allow one State to undermine the legislative and policy choices of other States as well as prompting abdication by the States to the federal government of their primary responsibilities to determine the uses of waters within their boundaries and to protect public health and welfare and the environment.

The Tenth Circuit's decision reflects a reasonable interpretation of the Clean Water Act which alone fulfills the expressed purposes and goals of the statute. Under that decision an upstream State will regulate the dischargers within its boundaries while still maintaining the integrity of the downstream State's desired water uses and quality.

ARGUMENT

This case turns on the question of whether a discharger in an upstream State may be allowed to undermine the entire system of water uses, water quality standards, and effluent limitations established by a downstream State and approved by U.S. EPA. Answering this question primarily involves an issue of statutory interpretation with implications for State Sovereignty and the Commerce Clause. The *Amici* States support the interpretation of the Clean Water Act employed by U.S. EPA and the Tenth Circuit because it preserves State sovereignty by maintaining each State's right to establish the uses and quality of the waters within its boundaries while retaining each State's authority to control the dischargers under its jurisdiction. The *Amici* States submit this brief in order to strongly urge this Court to affirm the decision of the Tenth Circuit.

I. THE TENTH CIRCUIT'S DECISION COMPLIES WITH THIS COURT'S GUIDELINES ON STATUTORY INTERPRETATION.

When measured against guidelines established by this Court on statutory interpretation, it is clear that the Tenth Circuit's determination that under the Clean Water Act, a discharger in an upstream State must demonstrate compliance with the stricter water quality standards of a downstream State in order to obtain an NPDES permit is the proper interpretation of the Clean Water Act. Applying those same guidelines to the interpretation of the Clean Water Act pressed by the Arkansas petitioners demonstrates the inadequacy of their interpretation.

In this case, the U.S. EPA construed the Clean Water Act to require a discharger in an upstream State whose effluent will affect water quality in a downstream State to demonstrate compliance with the stricter water quality standards of the downstream State in order to obtain an NPDES permit. Accordingly, the standards for statutory construction enunciated by this Court in the case of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), apply and were properly employed by the Tenth Circuit –

> "Determining the extent of EPA's authority under the Clean Water Act is a question of law that we review *de novo*. 'Our first inquiry is whether "Congress has directly spoken to the precise question at issue. If the intent of congress is clear that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."' *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059, 1065 (10th Cir. 1987) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984), rev'd on other grounds, 486 U.S. 204, 108 S.Ct. 1765, 100 L.Ed.2d 238 (1988)). However, where the statute is ambiguous, EPA's construction, as that of an agency charged with administering the statute, is entitled to substantial deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). If EPA's interpretation of the Clean Water Act is reasonable, we should not disturb it unless it 'is contrary to the policies Congress sought to implement in enacting the statute.' 813 F.2d at 1965; *see also* 467 U.S. at 845, 104 S.Ct. at 2783." (908 F.2d at 599, 604).

In the proceedings below, both U.S. EPA and the Oklahoma parties asserted that the inquiry could end with the first prong of *Chevron* urging the Clean Water Act's manifestation of intent on this issue to be clear. The *Amici* States would echo that assertion at this level. The Tenth Circuit, however, went on to apply the second prong of *Chevron* and upheld the U.S. EPA's interpretation of the Clean Water Act, finding it to be "reasonable and consistent with Congress' purposes in enacting the CWA" (908 F.2d at 604).

This inquiry must start with the purposes of the Clean Water Act. Section 101 clearly and succinctly states those purposes. In particular, Section 101(b) states that:

> "[I]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement of land and water resources * * * ."

The uses of water resources are, of course, dependent upon the quality of that water. Recreational uses, public

water supply uses, irrigation uses and other uses all require water of a certain quality. If the water is not of that quality, it cannot be used for such purposes. Thus, without the ability to assure that its waters are of a certain quality, a State cannot assure the use of that water for purposes it has chosen. Without that ability the congressional purpose expressed in Section 101(b) will go unfulfilled.

U.S. EPA's interpretation of the Clean Water Act and the affirmation of that interpretation by the Tenth Circuit are grounded in fulfilling the purposes expressed above as well as in giving meaning to the language of Sections 301, 303, and 401 of the Clean Water Act. Section 301 of the Clean Water Act calls for compliance with water quality standards established by any State. Section 303 provides for the review and approval of State water quality standards by U.S. EPA and, once approved, the State water quality standard becomes the "water quality standard for the applicable waters of that State". As an "applicable water quality standard", the State standard must be complied within order for a permit to be issued pursuant to Section 401. Section 401 requires issuance of a certification by the source State that all requirements of the Clean Water Act will be met before a federal license or permit could be issued. These requirements are fleshed out further by regulations promulgated by U.S. EPA. 40 C.F.R. 122.4 prohibits issuance of a permit unless compliance with the applicable water quality requirements of "all affected States" is demonstrated. 40 C.F.R. 122.44(d)(4) makes a similar prohibition. Section 510 precludes any interpretation of the Clean Water Act which would impair a State's authority over waters within its

boundaries. Finally, Section 505(h) of the Clean Water Act allows a State to sue to enforce effluent limitations on an out-of-state discharger necessary to prevent violations of the State's water quality standards. If a permit may be issued in an upstream State which does not protect the downstream State's water quality, this provision is meaningless.

When viewed as a whole, all of these provisions drive home the point that the Clean Water Act was intended to require an upstream discharger to comply with a downstream State's stricter water quality standards. Such an interpretation is clearly in keeping with the purposes of the Clean Water Act. Section 101 states that the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" and that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States" to combat water pollution.

To counter this compelling interpretation of the Clean Water Act, the Arkansas petitioners single out a solitary procedural provision of the statute – Subsection 402(b)(5). That provision requires a State issuing an NPDES permit to provide an opportunity to submit recommendations on the permit to those States "whose waters may be affected by the issuance of the permit". According to the Arkansas petitioners, this provision places downstream States solely in an "advisory capacity", Arkansas petitioner's brief, at 18, citing *International Paper Company v. Ouelette*, 479 U.S. 481, 490-91 (1987), and leaves upstream States free to ignore impacts on a downstream States's water quality.

This provision is more readily reconciled with the language and expressed purposes of the entire Clean

Water Act and the substantive requirements of Sections 505(h), 402(b)(1)(A) and 301 (which require compliance with all "applicable water quality standards") if Section 402(b)(5) is viewed as a procedural requirement. Thus, Section 402(b)(5) would provide the affected state with the means for participating in the determination of *how* the mandate of compliance with its water quality standards will be fulfilled (rather than just being allowed to comment on *whether* its water quality should be protected). This interpretation retains the authority of the source State to determine the details of *how* the discharger would be regulated so as to assure downstream water quality standards would be met while preserving the downstream State's right to establish water quality conditions and uses within its boundaries.

Such an interpretation also avoids undermining the Clean Water Act's efforts to establish minimum water quality standards nationwide. Section 303 authorizes U.S. EPA to establish water quality standards where those established by a State are not consistent with the applicable requirements of the Clean Water Act. Once promulgated, those standards become the applicable water quality standards for the affected waters of that State. Under the Arkansas petitioners' interpretation of 402(b)(5), a permitting State would be totally free to disregard such standards in making its permit decision. Such a result would not be in keeping with the spirit and purpose of the Clean Water Act but would be unavoidable if the Arkansas petitioners' interpretation of 402(b)(5) is accepted.

In essence, the Arkansas petitioners advocate that downstream State standards approved pursuant to the

Clean Water Act have no bearing on a permit-issuing State's establishment of permit terms and conditions, on U.S. EPA's review of a State-issued permit, or upon U.S. EPA's issuance of a permit. Thus, the permitting authority may ignore the downstream State's standards and may do so for any reason or no reason at all. If, as the Arkansas petitioners advocate, the Clean Water Act allows the upstream State to ignore a downstream State's standards, a permit which did so would not be "outside the guidelines and requirements" of the Clean Water Act, regardless of the degree of deterioration of water quality it may cause downstream. Without the applicability of such standards, the Clean Water Act's goal of uniformity would be quickly undermined.

The potential for creating such a lack of uniformity was a primary factor in this Court's decision to reject the application of a downstream State's public nuisance laws to an upstream State discharger in *Ouellette, supra,* 479 U.S. at 496. The congressional goal of " 'clear and identifiable' discharge standards", *id.* at 496 would not be met under the Arkansas petitioners' interpretation. Under that interpretation, two adjacent facilities with similar discharges could be subjected to different effluent limits if the source State elected to protect the downstream State's water quality in one permit while opting to forego such protection in the second permit. Downstream State discharge standards would no longer be clear and identifiable since they would be subject to change when a new upstream discharger's effluent resulted in a deterioration of the downstream State's water quality.

The same result would occur in those instances where a downstream State had adopted water quality

standards meeting the minimum standards established by U.S. EPA rather than stricter standards. Under the Arkansas petitioners' interpretation, a source State would be free to ignore those standards as well. In instances where the water in the downstream State was at the minimum standard, the upstream State could authorize a new discharge which would result in an exceedance of that standard in the downstream State.

Because there are no limits circumscribing a State's discretion to ignore downstream State standards under the interpretation advocated by the Arkansas petitioners, that interpretation creates the potential for an upstream State to use discharge limits as a tool to drive business and industry out of a downstream State and into an upstream State. Discharge limits may be set at levels which would force tightening of downstream State discharge limits in order to maintain compliance with the downstream State's water quality standards. The less stringent upstream effluent limits would soon become very attractive to a downstream State discharger.

If, however, the downstream State's role is found to be one of assisting in the determination of how to attain compliance with its water quality standards, these pitfalls would be avoided. Under such a construction the permitting State would retain the authority to regulate dischargers within its boundaries while still maintaining the integrity of the downstream State's water quality. The permitting State would determine what effluent limits, permit conditions or other measures, were necessary to protect the downstream State's water quality. This discretion would be circumscribed by the requirement that the

discharge must still comply with the downstream State's standards.

Since the only water quality standards which would receive such treatment are those which U.S. EPA had approved, the Clean Water Act's goal of providing efficiency and predictability is met. *Ouellette, supra*, 479 U.S. at 496. Identifying such U.S. EPA-approved standards would be easily done. Unlike common-law standards which were preempted in *Ouellette*, upstream States could have input into the setting of the downstream State's water quality standards by participation in that State's rulemaking process and when they are submitted to U.S. EPA for review and approval.

This interpretation would also place U.S. EPA in the role of arbitrating technical disputes rather than disputes over conflicting State policy/legislative choices, a role usually reserved for this Court. As the Arkansas petitioners concede, under Section 402(d)(2) of the Clean Water Act U.S. EPA could veto a permit if it is "outside the guidelines and requirements" of the Clean Water Act. Thus, instead of being forced to determine whether the upstream State's reasons for ignoring a downstream State's water quality standards were sufficiently consistent with the Clean Water Act's "guidelines and requirements" to pass muster (without any standards to guide such a determination) U.S. EPA would only be required to determine whether the downstream State's standards are being met. If they are not met, the permit would be "outside the guidelines and requirements" of the Clean Water Act.

If U.S. EPA, as the permitting or reviewing agency, could authorize a permit which disregarded a downstream State's water quality standards, U.S. EPA would be doing indirectly what it has said it cannot do directly – reject a State standard as too stringent. As the Arkansas petitioners have noted, brief p. 25, U.S. EPA has interpreted the "savings clause" of Section 510 of the Clean Water Act to preclude it from disapproving a State's adoption of more stringent water quality standards and adopting a less stringent standard. *See, e.g.*, 54 Fed. Reg. 39,099 (1989) and *Homestake Mining Co. v. EPA*, 477 F.Supp. 1279, 1284 (D.S.D. 1979). Nonetheless, if U.S. EPA decides not to require compliance by an upstream discharger with a downstream State's stricter water quality standard, it will, in essence, be overruling the downstream State's stricter standard. Such a decision will either lead to the revocation of the stricter standard or the creation of an area where the stricter standard is not met. Such a result is clearly contrary to the Clean Water Act.

Judicial review at the State and federal levels would be enhanced if a court's inquiry focused on whether permit conditions adequately protected water quality than if the inquiry dealt with whether the appropriate choice was made between competing State policy/legislative choices. Evidence is much easier to adduce and review on technical issues than on policy issues.

In this light, it is clear that the Tenth Circuit's and U.S. EPA's interpretation of the Clean Water Act was reasonable and consistent with the purposes and intent of that statute. This determination is reinforced even further when considerations of State sovereignty and the Commerce Clause are factored in. As the water quality

received from the upstream State deteriorates, dischargers in the downstream State would be subjected to increasingly stringent standards in order to achieve the water quality desired by the downstream State. As effluent limitations became more stringent, the cost of compliance increases as well. There may be instances where the only way to maintain the desired downstream water quality will be to entirely eliminate discharges in the downstream State. When faced with such an impact, States may well relax their water quality standards in order to avoid that impact. That result is contrary to the goals and purposes of the Clean Water Act.

II. REQUIRING AN UPSTREAM STATE DISCHARGER TO COMPLY WITH A DOWNSTREAM STATE'S WATER QUALITY STANDARDS DOES NOT CONTRAVENE THE COMMERCE CLAUSE.

Because Congress explicitly called upon the States to develop their own stricter water quality standards and to submit them for U.S. EPA review and approval, requiring upstream States to assure that their dischargers will not violate those standards does not offend the Commerce Clause. Accordingly, any Commerce Clause "implications" cannot serve as a basis for overruling the Tenth Circuit.

"When Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985). See also *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653-654 (1981). In this case, Section 303 of the Clean Water

Act plainly preserved the authority of each State to promulgate its own water quality standards for the waters within its boundaries. Section 303 and other provisions of the Clean Water Act, including Sections 101(b) and 510, encourage States to enact water quality standards stricter than of the minimum requirements of the Clean Water Act in order to fulfill the statutes stated objective of restoring and maintaining the integrity of the nation's waters. The stricter State standards at issue in this case are not merely the result of a reservation of States' rights. Instead, there is an express authorization of stricter State water quality standards which precludes any assertion that the Commerce Clause preempts those standards and forecloses their application against out-of-state sources.

Furthermore, it is a matter of hornbook law that "Congress can enact legislation prescribing that the federal pollution standard in each state shall be the same as the State standard." J. Nowak, R. Rotunda, and J. Young, Constitutional Law, at 249 (1978). The Clean Water Act's designation of a U.S. EPA-approved State water quality standard as the "applicable water quality standard" represents a congressional incorporation by reference of a State standard as the standard that must be complied with for the waters within that State. See also *United States v. Sharpnack*, 355 U.S. 286, 294 (1958). In that case the Court affirmed Congress' adoption of State criminal statutes as the standard for federal enclaves.

Finally,

> "The commerce clause is not a guaranty or the right to import into a state whatever one may please, absent a prohibition of Congress, regardless of the effects of the importation upon the local community."

Robertson v. California, 328 U.S. 440, 458 (1946). *See also, Maine v. Taylor*, 477 U.S. 131, 148 fn. 19 (1986). A downstream State's water quality standards reflect its determination of the amount of wastes that can be dumped into its waters without curtailing its selected uses. Furthermore, the Oklahoma regulations at issue herein were promulgated in response to the congressional call for stricter State standards and approved by U.S. EPA. Requiring an out-of-state discharger to comply with those standards does not offend the Commerce Clause.

III. THE TENTH CIRCUIT'S DECISION PRESERVES THE SOVEREIGNTY OF UPSTREAM AND DOWNSTREAM STATES RATHER THAN SACRIFICING ONE FOR THE OTHER.

The Clean Water Act's requirement that an upstream State discharger comply with a downstream State's water quality standards represents a mechanism for resolving concerns of neighboring States rather than a mechanism by which one State's policy choices can undercut those of another. Adopting the interpretation of the Clean Water Act put forward by the Arkansas petitioners would allow one State to undermine another State's policy and, in essence, to determine how entities in another State would be regulated.

As the Tenth Circuit noted (908 F.2d at 602), if an upstream State discharger is not obligated to comply with a downstream State's water quality standards, the upstream State will dictate what the water quality and

water uses will actually be in the downstream State. Thus, there is only one interpretation of the Clean Water Act offered in this case that would result in one State's policy (as expressed in terms of water quality) being imposed upon another State and that is the interpretation proffered by the Arkansas petitioners. If the permitting authority in an upstream State need not assure that a discharger must comply with a downstream State's water quality standard then the downstream State must impose more stringent effluent limitations on the dischargers within its boundaries in order to preserve its desired water quality and water uses. Thus, the downstream State will have water quality and water uses determined by the upstream State.

If, however, the discharger in the upstream State must comply with the downstream State's stricter water quality standards, the upstream State's water quality will be at least as good as that State's standards and the downstream State's water quality and water uses will be preserved. This result would also be in keeping with the purpose and objective of the Clean Water Act to enhance water quality throughout the nation.

This interpretation of the Clean Water Act would not offend constitutional principles by allowing one State to "directly" control activities in another State. *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). The permitting agency (either U.S. EPA or the source State) would be the one who would regulate the discharger by identifying and imposing those permit conditions necessary to protect downstream State water quality. The downstream State's role would be similar to that of the permit applicant

during the permit process – a party to the permit proceeding with a vested interest at stake and to whom a right of appeal is accorded. Unlike the permit applicant, however, the downstream State's interest would be an entitlement which had to be protected before the permit could issue. In the case of a downstream State, the appeal is made to the U.S. EPA pursuant to Section 402(d) of the Clean Water Act rather than to the permitting State's appellate tribunal. Such an interpretation maintains the "subordinate positions" of downstream States as described by this Court in *dicta* in *Ouellette, supra*, 479 U.S. at 491, while still according the protection to the downstream State's water quality standards established by Congress. This interpretation is further reinforced by Section 505(h) of the Clean Water Act. Pursuant to Section 505(h) a downstream State could bring suit against the administrator to enforce NPDES permit effluent limits when its water standards were violated. This authority would be meaningless if a permit could be issued with effluent limits that would result in water quality violations.

If the upstream discharger can disregard the downstream State's water quality standards then the downstream State is placed between Scylla and Charybdis – between lowering its water quality standards or driving its dischargers out of State with drastic effluent limitations. When faced with such a choice, States will abdicate to the federal government their primary responsibilities and rights to reduce and eliminate pollution and to determine water quality and water uses within their boundaries. Because any State's voluntary efforts to enhance water quality would be undercut by an upstream State

with lower water quality, each State would wait for U.S. EPA to establish new, universal water quality standards. Such a result is clearly contrary to the purposes and objectives of the Clean Water Act and principles of State sovereignty.

In this light, it is clear that only reversal of the Tenth Circuit's decision will have adverse implications on State sovereignty. These implications strongly counsel against accepting the Arkansas petitioners' interpretation of the Clean Water Act and in favor of affirming the Tenth Circuit.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully urge the Court to affirm the decision of the Tenth Circuit Court of Appeals respecting downstream States' standards and preserving the proper balance between upstream and downstream States.

Respectfully submitted,

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